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No. 86-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE CO., INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, CITY OF GRAPEVINE, TEXAS,
Respondents.

BRIEF OF PRIVATE TAXI COMPANIES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS RELATED TO THE PRIVATE TAXI COMPANY RESPONDENTS

I.

IS THERE A, CASE OR CONTROVERSY AS TO THE PRIVATE TAXI COMPANY RESPONDENTS SINCE THE LOWER COURT ALSO DISMISSED THE ACTION AGAINST THEM ON AN INDEPENDENT AND ALTERNATIVE GROUND AS TO WHICH PETITIONERS DO NOT SEEK REVIEW?

II.

WHEN THERE WAS EXTENSIVE STATE REGULATION WHICH ESTABLISHED "A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY" SHOWING "THE LEGISLATURE COMTEMPLATED THE ACTS COMPLAINED OF" BEFORE ANY AMENDMENT TO THE STATUTES IN QUESTION OCCURRED, DID THE LOWER COURT'S REFERENCE TO A SUBSEQUENT AMENDMENT, WHICH VALIDATED AND CONFIRMED THE CHALLENGED CONTRACTS AS "AN ADEQUATE INDICATION OF THE STATES DESIRE TO ALLOW JOINT AIRPORT BOARDS TO DISPENSE COMPETITION", RAISE AN IMPORTANT QUESTION RELATING TO RETROACTIVITY?

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STATUTES INVOLVED

The federal statutes involved are Article III of the Constitution; the Sherman Act, 15 U.S.C. §1 and 2; and the Clayton Act, 15 U.S.C. §35. The state statutes involved are the Texas Home Rule Statute, Tex. Rev. Civ. Stat. art. 1175 (Vernon 1963); the Texas Municipal Airport Act, Tex. Rev. Civ. Stat. art. 46d (Vernon 1969); and the Texas Motor Business Act, Tex. Rev. Civ. Stat. art. 911a (Vernon 1964).

JURISDICTION

The existance of an alternative defense as to the private taxi company respondents precludes a case or controversy under Article III of the Constitution.

STATEMENT OF THE CASE

The Dallas/Fort Worth Regional Airport ("Regional Airport") is owned by the City of Dallas, Texas ("Dallas"), and the City of Fort Worth, Texas ("Fort Worth"). The two cities built it between Dallas and Fort Worth, in a cooperative effort, at the request of the Federal Aviation Administration. The Dallas/Fort Worth Regional Airport Board ("Regional Airport Board") governs the Regional Airport, with rules and regulations approved by Dallas and Fort Worth. The system selected by Dallas, Fort Worth, and the Regional Airport Board to regulate and authorize taxicabs to serve the Regional Airport required contractual authority. These rules and regulations required taxi drivers and companies who wished to provide service to do so pursuant to a contract. Dallas, Fort Worth, and the Regional Airport Board contracted with Surtran Taxicabs, Inc. for the period from the end of 1974 to the start of 1985. The contractual authorization system is no longer used, and all drivers who wish to serve the Regional Airport do so under a permit system (which petitioners do not complain of) at the same cost they paid under the contract system.

In 1970 the Regional Airport Board decided to select one operator to handle all ground transportation needs, both bus and taxicab, from the Regional Airport to the ten-county area around the Regional Airport. Seven companies were invited to bid, but no bids were submitted to provide both bus and taxicab services. The decision of Dallas, Fort Worth, and the Regional Airport Board to select one ground transportation operator is at the heart of this controversy. This decision was based on the recommendation of

an independent consultant who had been hired to study transportation needs and to recommend means of implementing service. Several consultants were thereafter retained to provide technical assistance on ground transportation matters. The consultants continued to recommend the single operator system, but the system was later modified to allow all taxi drivers who wished to provide service the opportunity to do so.

When it became obvious that no single private transportation company could meet the bid criteria, Dallas and Fort Worth jointly formed the D/FW Surtan System ["Surtan System"] to serve as the single operator of all airport ground transportation services. Surtan System in turn contracted with the Regional Airport Board to provide all ground transportation for hire from the Regional Airport.

Dallas, Fort Worth, and Surtran System determined that Surtan System would subcontract with the private sector for taxicab services. Surtran System, which was managed by the Dallas Transit Department, provided bus service to or from the Regional Airport. The final bid criteria, adopted by the Regional Airport Board and approved by both Dallas and Fort Worth, required the potential taxi subcontractor to bid on outbound taxi service from the Regional Airport to anywhere in the surrounding ten-county area. The Dallas Transit Department, as manager of Surtran System, solicited bids from local taxi companies for taxi service.

Yellow Cab of Dallas, Inc. and Fort Worth Cab & Baggage Co., Inc. received approval from Surtran System to form a corporation to bid for taxi services. This company, Surtran Taxicabs, Inc., submitted the

only bid. Surtran Taxicabs, Inc. signed a contract with Dallas, Fort Worth, and Surtran System. This contract was renewed one time. Before the D/FW Airport opened, Surtran Taxicab, Inc. applied for and received, from the Railroad Commission of Texas ("Texas Railroad Commission") a Certificate of Public Convenience and Necessity to serve the D/FW Airport. During the second contract, Yellow Cab of Dallas, Inc., applied for and received such a certificate. No other company had such a certificate or authority during the term of either of the two contracts.

In the years before the 1983 amendments, referred to by petitioner, the two principal legislative acts by which the State of Texas provided for regulation of taxicab service at the Regional Airport were the Texas Municipal Airport Act, Tex. Rev. Civ. Stat. Ann. art. 46d (Vernon 1969), and the Texas Motor Bus Act, Tex. Rev. Civ. Stat. Ann. art. 911a (Vernon 1964). Under the Motor Bus Act, regulation was provided by a state agency, the Texas Railroad Commission. This regulation was mandatory and its terms were detailed by the statute. Under the Texas Municipal Airport Act, the regulation was provided by a joint airport board. This regulation was of the type which had traditionally been provided by cities within their limits. Since the Texas Municipal Airport Act, allows a joint airport board the same authority over taxicabs at a regional airport as cities have over taxicabs within their limits, one should also consider the authority which the State of Texas gives cities such as Dallas and Fort Worth to regulate taxicabs.

The following provisions of the Motor Bus Act, *supra*, were applicable before the 1983 amendments referred to by petitioners:

The term "Motor Bus Company" when used in this Act means every corporation * * * owning, controlling, operating or managing any motor propelled passenger vehicle * * * and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise; * * * provided further, that the term "Motor Bus Company" as used in this Act shall not include corporations or persons, * * * insofar as they own, control, operate, or manage motor propelled passenger vehicles operated wholly within the limits of any incorporated town or city, and the suburbs thereof, whether separately incorporated or otherwise.

All motor-bus companies, as defined herein, are hereby declared to be "common carriers" and subject to regulation by the State of Texas, and shall not operate any motor propelled passenger vehicle for the regular transportation of persons as passengers for compensation or hire over any public highway in this State except in accordance with the provision of this Act. . .

It is hereby declared that when existing transportation facilities on any highway in this State do not provide passenger service which the Commission shall deem adequate to provide for public convenience on such highway, then such inadequacy of service shall be considered as creating a condition

where the public convenience and necessity require the designation of, and provision for, additional service on such highway, and it shall be the duty of the Commission to issue certificate or certificates as herein provided, if in the opinion of said Commission the issuance of such certificate will promote the public welfare.

The Commission is hereby vested with power and authority, and it is hereby made its duty to supervise and regulate the public service rendered by every motor bus company operating over the highways in this State, to fix or approve the maximum, or minimum, or maximum and minimum, fares, rates or charges of, and to prescribe all rules and regulations necessary for the government of, each motor bus company; to prescribe the routes, schedules, service, and safety of operations of each such motor bus company; to acquire the filing of such annual or other reports and of such other data by such motor bus company as the Commission may deem necessary.

* * *

The Commission is further authorized and empowered to supervise and regulate motor bus companies in all other matters affecting the relationship between such motor bus companies and the traveling public that may be necessary to the efficient operation of this law.

It shall be unlawful for any motor bus company to sell any tickets for the transportation

of passengers within this State over any motor bus line at any rates other than the rates, authorized and approved by the Commission under the terms of this law;

* * *

No motor-bus company shall hereafter regularly operate for the transportation of persons as passengers for compensation or hire over the public highways of this State without first having obtained from the Commission under the provisions of this Act a certificate or permit declaring that the public convenience and necessity require such operation;

* * *

The Commission is hereby vested with power and authority, and it is hereby made its duty upon the filing of an application for a certificate of public convenience and necessity, to ascertain and determine under such rules and regulations as it may promulgate, after considering existing transportation facilities on such highway, the service rendered and capable of being rendered thereby, and the demand for, or need of additional service, if there exists a public necessity for such service, and if public convenience will be promoted by granting said application and permitting the operating of motor vehicles on the highways designated in such application, as a common carrier for hire.

* * *

Any officer, agent, servant, or employee of any corporation and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed Five Hundred ($500.00) Dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment; and the violations occurring on each day shall each constitute a separate offense.

Any officer, agent, servant, or employee of any motor bus company as heretofore defined, and any motor bus company, as heretofore defined and/or the owner or operator, officer, servant, agent or employee, or any such owner or operator of any bus terminal who violates or fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the Commission shall be subject to and shall pay a penalty not exceeding Five Hundred ($500.00) Dollars, for each and every day of such violation. Such penalty to be recovered in any court of competent jurisdiction in Travis County, Texas, or in the County in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the county or district attorney of the county in which the violation occurs, in the name of the State of Texas, and by

direction of the Railroad Commission of Texas.

The following provisions of the Code of Rules and Regulations of the Dallas/Fort Worth Regional Airport Board were applicable before the 1983 amendment referred to by petitioners:

> The provisions of this Code shall constitute a special enactment of effect only within the boundaries of the Dallas-Fort Worth Regional Airport, and adopted in cooperation and concert with other Cities in recognition of the unique and special requirements of the planning, . . . operation, regulation, and protection and policing of the Dallas-Fort Worth Regional Airport. . . . To the extent of any conflict between the existing or future general ordinances of any city and this Code, this Code shall prevail only within the boundaries of the Dallas-Fort Worth Regional Airport and not otherwise.
>
> It shall be unlawful for any person to solicit ground transportation business on the Airport, or to pick up passengers or baggage for hire on the Airport without a ground transportation permit from the Airport Board, or without having an Airport Board Concession, License or Franchise therefor, and, to the extent of any operations outside the Airport Boundaries, without a license, permit or franchise from any City through which said business is conducted if lawfully regulated by the ordinances of any such city.

Duly certified copies of all rules, regulations and orders of the Dallas-Fort Worth Regional Airport Board pertaining to the subjects mentioned in Section 3; and prescribing penalties for violations, shall be forwarded by the Executive Director to the chief administrative officer of each city adopting this Code, and if the City Council of such City shall elect to enact such rules, regulations and orders in the manner and form prescribed for other penal ordinances of such City, the municipal court or courts of such City shall each have concurrent jurisdiction with any other proper forum over offenses arising thereunder and within the corporate limits of such City; and the duly authorized and commissioned security officers or other enforcement officers of the Dallas-Fort Worth Regional Airport shall thereafter be authorized to file cases arising thereunder in such municipal courts, in addition to any other convenient and proper forum.

The authorized and commissioned security officers of the Dallas-Fort Worth Regional Airport Board shall issue and use traffic citations and summons of the type now used by the Texas Highway Patrol with such changes as are necessitated to render same applicable to the Dallas/Fort Worth Regional Airport.

* * *

Airport Police. The primary responsibility for police, fire and health security and for

> the enforcement of regulations, and for the performance of inspections and services within the boundaries of the Dallas-Fort Worth Regional Airport shall be vested in the Dallas-Fort Worth Regional Airport Board and in the Police force and such health officers as may from time to time be duly appointed and commissioned as such officers by the Dallas-Fort Worth Regional Airport Board.
>
> . . .the violation of any provision of The Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board where an act or a failure to act is made unlawful or is otherwise prohibited, shall be punishable by a fine not to exceed Two Hundred Dollars ($200.00), and each day a violation shall continue shall constitute a separate offense; provided, however, where the offense is one for which a penalty is fixed by state law, the latter penalty shall govern.

The Municipal Airport Act, contained the following provisions before the 1983 amendments referred to by petitioners:

> [t]wo (2) or more municipalities are specifically authorized to make . . . agreements . . . for the joint acquisition and operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action.
>
> The joint board shall have power to . . . operate, regulate, protect and police any air-

> port . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport,. . . subject to the limitations of Subsection (d) of this Section.
>
> Police Regulations. Any resolutions, rules, regulations or orders of the joint board dealing with subjects authorized by Section 7 of the Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.
>
> * * *
>
> [t]he . . . operation, regulation, protection and policing of airports . . . and the exercise of any other powers herein granted to municipalities and . . . to be severally or jointly exercised, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; . . . and in the case of any municipality other than a county, are declared to be municipal functions and purposes as well as public and governmental.

The act provides two cities may jointly do what a city may do individually, and the act provides a city may:

> . . .regulate, protect and police airports . . ., either within or without the territorial limits of such municipality . . . including the . . . operation at such airports of . . . facilities . . . for the comfort and accommodation of air travelers. . . .
>
> * * *
>
> In operating an airport . . ., such municipality may, . . . enter into contracts, . . . and other arrangements for a term not exceeding forty (40) years with any persons:
>
> (1) granting the privilege of using . . . such airport . . ., or space therein for commercial purposes;
>
> (2) conferring the privilege of supplying . . ., services . . . at such airport. . . .
>
> (3) making available services to be furnished by the municipality . . . at such airport. . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, . . . or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

The Texas Home Rule Statute included the following provisions prior to the 1983 amendment referred to by petitioners:

> . . . (home rule cities) shall have full power of local self-government, and among the other

powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * *

To hold . . . any character of property,. . . .

* * *

To prohibit the use of any street, . . ., or grounds of the city by any . . . character of public utility without first obtaining the consent of the governing authorities expressed by ordinance and upon paying such compensation as may be prescribed and upon such condition as may be provided by any such ordinance. To determine, fix and regulate the charges, fares or rates of any person, firm or corporation enjoying or that may enjoy the franchise or exercising any other public privilege in said city and to prescribe the kind of service to be furnished by such person, firm or corporation, and the manner in which it shall be rendered. . . .

* * *

To license, operate and control the operation of all character of vehicles using the public streets, including . . ., automobiles. . . .

To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire . . . on the public streets and alleys of the city.

* * *

To license any lawful business, occupation or calling that is susceptible to the control of the police power.

During the 1983 legislative year, the Texas legislature passed House Bill 593. In the portion of House Bill 593 which dealt with the Texas Railroad Commission's authority over motor bus companies, the legislature provided that the Railroad Commission would continue to exercise authority over taxicab companies providing service from the Dallas/Fort Worth Regional Airport. That bill provides in part as follows:

AN ACT

Relating to the administration, power, duties, and continuation of the Railroad Commission of Texas, including the regulation of transportation. . . .

* * *

Section 14. Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927 (Article 911a, Vernon's Texas Civil Statutes), is amended to read as follows:

(c) the term "Motor Bus Company" when used in this Act means every corporation, or persons as herein defined, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of

> transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise. However, the term "Motor Bus Company" as used in this Act shall not include: . . .
>
> (3) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more than five passengers; permits, licenses, or certificates issued prior to June 1, 1983, would not be affected by the provisions of this exclusion. *Such taxicabs are motor buses only when they operate to or from an airport established pursuant to Chapter 114, Acts of the 50th Legislature, 1947, as amended (Article 46d-1 et seq., Vernon's Texas Civil Statutes).* [Emphasis supplied.]

This amendment clearly affirmed the jurisdiction of the Texas Railroad Commission over taxicab service at the Regional Airport.

In the same 1983 legislative session, the legislature also passed Senate Bill 960, which provides in pertinent part:

> SECTION 2. Subsection (d) Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes), is amended by adding Subdivisions (6) and (7) to read as follows: "(6) Taxicab Licensing. Notwithstanding any contrary provisions in H.B. 593, Acts of the 68th Legislature, Regular Ses-

> sion, 1983, a joint airport board established pursuant to Chapter 114, Acts of the 50th Legislature, Regular Session, 1947, as amended (Article 46d-14, Vernon's Texas Civil Statutes), shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.
>
> (7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, or order of each public agency would have in its own territory or jurisdiction.

This language expressly authorized the use of a license system by a Regional Airport Board in addition to the contractual system which continued to be authorized.

Subsequent to the passage of House Bill 593 and Senate Bill 960, the 1983 legislature passed Senate Bill 28. That act amended House Bill 593, and provides in pertinent part as follows:

> AN ACT
>
> Relating to the regulation of taxicabs serving airports
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927 (Article 911a, Vernon's Texas Civil Statutes), as amended by H.B. 593, Acts of the 68th Legislature, Regular Session, 1983, is amended to read as follows:

"(c) The term 'Motor Bus Company' when used in this Act means every corporation or persons as herein defined, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise. However, the term 'Motor Bus Company' as used in this Act shall not include: . . .

"(3) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more than five passengers; permits, licenses, or certificates issued prior to June 1, 1983, would not be affected by the provisions of this exclusion. *Such taxicabs are motor buses only when they operate to or from an airport established pursuant to Section 14, Chapter 114, Acts to the 50th Legislature, 1947, as amended*

(Article 46d-14 Vernon's Texas Civil Statutes)." [Emphasis supplied.]

This legislation also made it clear that the Texas Railroad Commission retained its jurisdiction over motor bus companies or taxicabs servicing a jointly-owned municipal airport such as the Regional Airport in question.

The Texas Railroad Commission then promulgated a rule, 16 Texas Administrative Code § 5.248, which had the effect of administratively deregulating the Regional Airport from Texas Railroad Commission regulation. This occurred during the final months of Surtran Taxicab, Inc.'s second five-year contract. When this rule was passed, Surtran Taxicabs, Inc. and Yellow Cab of Dallas, Inc. brought a declaratory judgment against the Texas Railroad Commission, Dallas, Fort Worth, and the Regional Airport Board. A judgment was entered in the state district court suit which considered and interpreted the statutes before the 1983 amendments, after the 1983 amendments, and the rule which had been adopted by the Texas Railroad Commission:

* * *

> ORDERED, ADJUDGED AND DECREED that this is an appropriate action for a declaratory judgment pursuant to Art. 6252-13(a), V.T.C.A. and Art. 224-1 V.T.C.A., and for injunction.
>
> It is further ORDERED, ADJUDGED AND DECREED that the amended regulations approved by the Dallas/Fort Worth Regional Airport Board on or about December 16, 1983, and thereafter approved by the City

of Dallas and the City of Fort Worth, which became effective January 1, 1984, are authorized by the Municipal Airport Act Art. 46d-14, V.T.C.S. and said amended regulations are lawful except for Sec. 8-5(b) and are not inconsistent with the Motor Bus Act, Art. 911a, V.T.C.S.

* * *

It is further ORDERED, ADJUDGED AND DECREED that the recent Rule adopted by the Railroad Commission of Texas, 16 Texas Administrative Code Sec. 5.248(b)(2)(c)(i), is inconsistent with the Motor Bus Act Art. 911a, V.T.C.S. and the portion of said aforementioned Rule which provides that taxicab service within the licensing jurisdiction of the Dallas/Fort Worth Regional Airport Board may be performed without a certificate issued by the Railroad Commission of Texas is invalid.

It is further ORDERED, ADJUDGED AND DECREED that the Railroad Commission of Texas does not have authority to allow taxicabs to operate from the Dallas/Fort Worth Regional Airport to the ten county area around said airport without a Certificate of Public Convenience and Necessity and compliance with other provisions of the Motor Bus Act.

It is further ORDERED, ADJUDGED AND DECREED that no taxicab company or taxicab driver may provide service from the Dallas/Fort Worth Regional Airport to

the ten county area around said airport unless they do so pursuant to both a Certificate of Public Convenience and Necessity from the Railroad Commission of Texas and authority from the Dallas/Fort Worth Regional Airport Board, and all taxicab companies and taxicab drivers must comply with the provisions of the Motor Bus Act, 911 V.T.C.S. and Dallas/Fort Worth Regional Airport Board's amended regulations which became effective January 1, 1984, before they may transport passengers by taxicab from the Dallas/Fort Worth Regional Airport to the ten county area around the Airport.

The District concludes and it is ADJUDGED that the Railroad Commission of Texas has the duty to regulate taxicab service from the Dallas/Fort Worth Regional Airport to the ten county area around the Airport.

It is further ORDERED, ADJUDGED AND DECREED that Terminal Cab Company, Inc. is enjoined from providing taxi service from the Dallas/Fort Worth Regional Airport without a Certificate of Public Convenience and Necessity from the Railroad Commission of Texas.

* * *

This judgment confirmed concurrent jurisdiction at the Regional Airport of both the Regional Airport Board and the Texas Railroad Commission. The court held that the Texas Railroad Commission was required by the Motor Bus Act, to regulate taxicab

service at the Regional Airport. This judgment was appealed by the defendants and became moot while on appeal in 1985 when the Texas legislature again amended the Texas Motor Bus Act. This amendment removed taxicabs from the definition of a motor bus company. All taxicab companies now provide service under a license system.

I. There Is No Case Or Controversy As To The Private Taxi Company Respondents Under Article III Of The Constitution

Insofar as the private taxi company respondents are concerned, the petition does not present a case or controversy. Under Article III of the Constitution a case or controversy is an indispensable prerequisite to jurisdiction. As stated in *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed. 2d 947, 88 S. Ct. 1942 (1968):

> The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.

The petitioners only ask the Court to grant certiorari to review of one of two propositions, either one of which the lower court found was sufficient to preclude any relief as to the private taxi companies. Regarding the private taxi companies, the lower court noted that the issues were:

> I. Should these consolidated actions be dismissed because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption?
>
> * * *
>
> III. Should the Plaintiffs' claims against the private taxi company defendants be dismissed as barred under the *Noerr-Pennington* doctrine?

The lower court determined:

> I. Plaintiffs' antitrust claims are DISMISSED because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption.
>
> * * *
>
> III. Plaintiffs' antitrust claims against the private Defendants are DISMISSED as barred under the *Noerr-Pennington* doctrine.

The petition before this Court does not request certiorari to review the lower court's determination that the *Noerr-Pennington* doctrine was applicable as a defense for the private taxi companies. Even if the Court should, and it should not because such holding

was correct, reverse the lower court's holding that the state action exemption applied, the unchallenged holding that the *Noerr-Pennington* defense also applied would still result in a dismissal of the petitioner's claims as to the private taxi companies. It is also significant that the test under the state action exemption for a private person is different from the test for a governmental body. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, (1985) and *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 105 S.Ct. 721, (1985).

Whether there is a case or controversy is determined at the time the issue is considered. *Golden v. Zwickler,* 394 U.S. 103, 22 L.Ed. 2d 113, 89 S.Ct. 956 (1969). As of the time this petition is presented, there is no case or controversy as to the private taxi companies. First, if a favorable resolution of the question petitioners seek to present as to these respondents will not give the petitioners relief, the minimum standards of a case or controversy have not been met. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 48 L.Ed. 2d 450, 96 S.Ct. 1917 (1976); *Murphy v. Hunt,* 455 U.S. 478, 71 L.Ed. 2d 353, 102 S.Ct. 1181 (1982). Even if the petitioners' question on the state action defense were answered in their favor, the private taxi companies' *Noerr-Pennington* antitrust immunity remains intact, barring petitioners' claim.

As this Court has stated, when any one of several propositions would support the judgment rendered, and one of the propositions is found sufficient, it is unnecessary to consider the others:

> The information consists of several counts, to all of which exceptions are taken. The

> Court however is of the opinion that the Fourth Count is good and this renders it unnecessary to decide the others.

Locke v. United States, 11 U.S. 339, 3 L.Ed. 364. In short, a federal court will not act on a question when there is no case or controversy, *O'Shea v. Littleton,* 414 U.S. 488, 38 L.Ed. 2d 674, 94 S.Ct. 669 (1974); and there is none here.

A cause of action may present a case or controversy as to some and not to other parties. Dismissal of the parties in the action as to which there is no case or controversy is proper. *Roe v. Wade,* 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973). Therefore, the private taxicab companies must be dismissed since no case or controversy exists as to them.

A second reason for denying the petition is mootness. An issue is *moot* if no order of the Court could properly affect the petitioner's rights with respect to the issue the Court is asked to review. *Honig v. Students of California School for the Blind,* 471 U.S. _ , 85 L.Ed. 2d 114, 105 S.Ct. ___(1985). The inability of a Court to grant any effectual relief renders the matter moot. *Brownlowe v. Schwartz,* 261 U.S. 216, 43 S.Ct. 263, 67 L.Ed. 620 (1923); *Heitnuller v. Stokes,* 256 U.S. 359, 65 L.Ed. 990, 41 S.Ct. 522 (1921); *Pease v. Rathbren-Jones Engineering Co.,* 243 U.S. 273, 61 L.Ed. 715, 37 S.Ct. 283 (1917); *Tennessee v. Condors,* 189 U.S. 64, 47 L.Ed. 709, 23 S.Ct. 579 (1903); *Mills v. Green,* 159 U.S. 651, 40 L.Ed. 293, 16 S.Ct. 132 (1985).

Because the private taxicab companies are immune from antitrust liability on other valid grounds, the state action defense question is moot as to them. This

Court has consistently held that it is its duty "to decide actual controversies by a judgment which can be carried into effect and not to give opinions on moot questions or abstract propositions, or to decide principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green, supra; Local No. 8-6 v. Missouri,* 361 U.S. 363, 4 L.Ed. 2d 373, 8 S.Ct. 391 (1960).

There must be a personal stake in the outcome of the controversy in order to assure the adverseness of the litigation. *Sierra Club v. Morton,* 405 U.S. 727, 31 L.Ed. 2d 636, 92 S.Ct. 1361 (1972); *Valley Forge College v. Americans United,* 454 U.S. 464, 70 L.Ed. 2d 700, 102 S.Ct. 752 (1982); *Linda R. S. v. Richard D.,* 410 U.S. 614, 35 L.Ed. 2d 536, 93 S.Ct. 1146 (1973), *Socialist Tabor Party v. Gilligan,* 406 U.S. 583, 32 L.Ed. 2d 317, 92 S.Ct. 1716 (1972). In fact, "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States,* 319 U.S. 41, 63 S.Ct. 910 87 L.Ed. 1199 (1943) (emphasis added); *DeFunis v. Odegaard,* 416 U.S. 312, 40 L.Ed. 2d 164, 94 S.Ct. 1704 (1974); *Honig v. Students of Cal. School For Blind,* 471 U.S. ___, 85 L.Ed. 2d 114, 105 S.Ct. ___ (1985); *Hall v. Beals,* 396 U.S. 45, 24 L.Ed. 2d 214, 90 S.Ct. 200 (1969).

Here, the Courts' opinion on whether the state action exemption was properly applied to the private respondents cannot affect the petitioners' rights at all. When a question becomes moot it is no longer sufficient as a case or controversy. *Lane v. Williams,* 455 U.S. 624, 71 L.Ed. 2d 508, 102 S.Ct. 1322 (1982); *Natural Milk Producers Association of California v.*

City and County of San Francisco, 317 U.S. 423, 63 S.Ct. 359, 87 L.Ed. 375 (1943); *Kremens v. Bartley,* 431 U.S. 119, 52 L.Ed. 2d 184, 97 S.Ct. 1709 (1977); *Amalgated Association v. Wisconsin Employment Relations Board,* 340 U.S. 416, 95 L.Ed. 389, 71 S.Ct. 373 (1951); *United States v. Alaska Steamship Company,* 253 U.S. 113, 64 L.Ed. 808, 40 S.Ct. 448 (1920). A request for an advisory opinion or for an answer to hypothetical question does not present a case or controversy. *Princeton University v. Schnid,* 455 U.S. 100, 70 L.Ed. 855, 102 S.Ct. 867 (1982); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 89 L.Ed. 1725 65 S.Ct. 1384 (1945); *Gilligan v. Morgan,* 413 U.S. 1, 37 L.Ed. 2d 407, 93 S.Ct. 2440 (1973); *Laird v. Tatum,* 408 U.S. 1, 33 L.Ed. 2d 154, 92 S.Ct. 2318 (1972); *O'Shea v. Littleton,* 414 U.S. 488, 38 L.Ed. 2d 674, 94 S.Ct. 669 (1974). Because there was a basis for denying liability on the part of the private taxi company defendants which is not at issue, any decision on the state action defense by this Court would be merely advisory.

This Court does not decide issues "unless absolutely necessary to a decision of the case." *United States v. International Union,* 352 U.S. 567, 1 L.Ed. 2d 563, 77 S.Ct. 529 (1957). There is no such necessity here. Because the Supreme Court "has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them," *North Carolina v. Rice,* 404 U.S. 244, 30 L.Ed. 2d 413, 92 S.Ct. 402 (1971), the petition does not present a case or controversy.

II. Because State Regulation Which Established "A Clearly Articulated And Affirmatively Expressed State Policy" Showing "The Legislature Contemplated The Acts Complained Of" Without The Subsequent Amendment Which Validated And Confirmed The Contracts Complained Of, The Petition Presents Nothing Of Importance

There are not special and important reasons for granting a writ of certiorari here. This case does not present a situation where the decision of the Court of Appeals is in conflict with another Court of Appeals on the same matter, and a federal question has not been decided by the Court of Appeals in a way that is in conflict with applicable decisions of this court. Sup. Ct. R. 17. For these reasons alone, the Petitioners' Writ should be denied.

The Petitioners' argument that a writ of certiorari should be issued is based on the lower Court's reference to language in a 1983 amendment to the Texas Municipal Airport Act. According to Petitioners, this reference indicated that the lower court had applied a retroactive rather than prospective test. The Petitioners attempted to use the same amendment in the trial court to argue that during the period before the 1983 Amendment, a "regulatory void" had existed in which no governmental entity had any authority to regulate taxi service at the airport. The argument was rejected on the basis that "[t]he opposite is true," and the lower Court held that "[t]his clarifying legislation does not suggest that no power to regulate existed before its enactment." *Woolen v. Surtran Taxicabs,* 801 F.2d 159, ___(5th Cir. 1986).

There was direct regulation of taxicab service at the Dallas/Fort Worth Regional Airport, by the State

of Texas, both before and after the 1983 amendments referred to by petitioners. A review of the applicable acts set forth in the Statement Of The Case establishes that extensive state regulation existed throughout the period in which the respondent taxicab companies served the Regional Airport.

The Texas Municipal Airport Act gave cities which jointly owned an airport outside their limits the same authority to regulate taxicabs at such airport as they had to regulate taxicabs in their city limits. The Regional Airport Board therefore had extensive authority to regulate taxicabs at the Regional Airport. The provisions of the Texas Motor Bus Act gave the Texas Railroad Commission extensive regulatory authority over taxicabs or vehicles for hire which operated on state highways from the Regional Airport. This regulation determined who could serve, the terms of this service, and the rates charged. All these regulations were enforced by a criminal penalty for a violation.

The conclusion by petitioners that a retroactive test was utilized is based on a misconstruction of what the lower court held and a disregard for what the record reflects regarding applicable legislation. There is no language in the opinion of the lower court which states that a retroactive rather than prospective test may be applied in any antitrust analysis. The reference to the subsequent amendment was viewed as nothing more than confirmation that "the legislature contemplated the kind of action complained of." The fact that the lower court expressly referred to the amendment as "clarifying legislation" establishes that this was not something new. In fact, the lower court stated that the amendment relied upon by petitioner

"does not suggest that no power to regulate existed before its enactment."

At best the dispute turns on a factual analysis of whether there was or was not sufficient statutory regulation before the amendment referred to, and this dispute is not sufficient for certiorari. *United States v. Johnson,* 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Texas v. Mead,* 465 U.S. 714 104 S.Ct. 1318, 79 L.Ed. 2d 714 (1984). This case is identical to *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir.) *cert. denied,* ___ U.S. ___ (1985), in all important respects, and the denial of certiorari in that case indicates certiorari should be denied in this case.

CONCLUSION

As to the private taxi company respondents, there is no justifiable controversy. In the unlikely event that all the points petitioners raised were resolved in petitioners' favor, petitioners would still not be entitled to relief as to the private taxi company respondents. The lower court's opinion is correct. It follows the decisions of other circuit courts as well as this Court's decisions. The petition ignores applicable state statutes and misconstrues the lower court's decision in an attempt to interject some question of importance in this matter when none exists. The petition should be denied.

Respectfully Submitted,

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